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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1076

PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, N. Y.,

Petitioner,

v.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	PAGE
JURISDICTION	2
OPINIONS BELOW	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
SPECIFICATION OF ERRORS TO BE URGED	4
REASONS RELIED ON FOR GRANTING THE WRIT	6
STATEMENT	8
ARGUMENT:	
By operations of 29 USC §158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after notice is given to the Federal and State Mediation Services as required by 29 USC §158(d)(3)	11
Where 29 USC §158(d)(4) places a duty upon the parties to continue in full force and effect all the terms and conditions of the existing contract and the terms and conditions so continued in full force and effect are breached during the protected period, the breach gives rise to a breach of contract action under 29 USC §185	17
Where the employees continued to perform their work in accordance with the terms of an expired written contract, the employer is under a duty not to unilaterally modify or terminate the terms and conditions of employment, or the arbitration provision which is manifestly related to those terms and conditions during the period of nego-	

PAGE

tiations for a new written agreement, and the terms and conditions of employment, and arbitration provision manifestly related to them, continue in effect and accrue to the employee as part of the employment contract and as the *quid pro quo* for the labor the employer continues to receive in accordance with the terms of of the expired written contract 20

Where by operation of Federal labor law the arbitration provision of an expired written bargaining contract remains in effect during the period of negotiations for a new written contract, during which the employer continues to receive the labor bargained for, the arbitration provision can be specifically enforced under 29 USC §185 27

Index to Appendix.

DECISION OF DISTRICT COURT 33

APPELLATE COURT DECISION 37

LOCAL 219, APPELLATE COURT DECISION 53

STATUTES:

29 U. S. C. §151 62
29 U. S. C. §158(d) 64
29 U. S. C. §185 65

ORDER 67

Cases Cited.

	PAGE
Atkinson v. *Sinclair Refining Co.*, 370 U. S. 238 (1962)	32
Bethlehem Steel Co., 136 NLRB No. 135, 50 LRRM 1013 (1962)	23, 25
Black Clawson Co. v. *International Ass'n of Machinists*, F. Supp. (D. C., N. D. N. Y. 1962), 45 Lab. Cas. par. 17,643, appeal docketed No. 27624; 2d Cir. June 27, 1962	21
Donnelly v. *United Fruit Co.*, 75 N. J. Super. 383, 183 A. 2d 415 (App. Div. 1962) Cert. granted 38 N. J. 316 (1962)	21
Dowd Box Co. v. *Courtney*, 368 U. S. 502 (1962)	32
Falsetti v. *Local 2026 UMW*, 400 Pa. 145, 161 A. 2d 882 (1960)	21, 23
Labor Board v. *Katz*, 369 U. S. 736 (1962)	25
Local No. 3, United Packinghouse Workers, CIO v. *NLRB*, 210 F. 2d 325 (C. A. 8; 1954) cert. denied 348 U. S. 822 (1954)	15
Local Union 219, Retail Clerks International Association v. *NLRB*, 265 F. 2d 814 (C. A., D. C. Cir. 1959)	6, 12, 13, 14, 15, 16, 17
Ostrofsky v. *United Steelworkers*, 171 F. Supp. 782, (D. C., D. Md. 1959) aff'd 273 F. 2d 614 (4th Cir. 1960) cert. denied, 363 U. S. 849 (1960)	21, 22
Parker v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297, 182 N. Y. S. 2d 577 (1959)	21
Potoker v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 141 N. E. 2d 841 (1957) cert. denied 355 U. S. 883 (1957)	31
Robert Lawrence v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C. A. 2d Cir. 1959) cert. granted 362 U. S. 909 (1960); cert. dismissed 364 U. S. 801 (1960)	24
Smith v. *Evening News Ass'n*, 371 U. S. 195 (1962) reversing *Smith* v. *Evening News Ass'n*, 362 Mich. 350 (1961)	32

PAGE

Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 30

Steelworkers v. *Warrier & Gulf Navigation Co.*, 363 U. S. 574 (1960) 16, 27, 29

Teamsters Local v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 32

Termination of Collective Bargaining Agreements, Survival of Earned Rights, 110 U. Pa. L. Rev. 458 (1962) 28

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957) 4, 8, 16

United States v. *Voges*, 124 F. Supp. 543 (D. C. E. D. N. Y., 1954) 21, 22

Zdanok v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961) aff'd 370 U. S. 530 (1962) 28

STATUTES AND MISCELLANEOUS.

28 USC §1254 2

National Labor Relations Act, 29 USC §158(d) 2, 4, 6, 10, 11, 12, 13, 16, 20

Labor Management Relations Act, 29 USC §185 ..... 2, 3, 5, 7, 11, 15, 17, 18, 19, 20, 27, 29, 32

29 USC §151 ..... 4, 8, 14

29 USC §158(d)(1) 8, 17

29 USC §158(d)(3) 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

29 USC §158(d)(4) 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

Section 1 9

Section 8(a)(5) 26

Section 8(d) 6, 14

301(a) 31

Section 301 27

Legislative History of Section 301(a) 19, 31

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Procter & Gamble Independent Union of Port Ivory, N. Y., respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Second Circuit, rendered on, and which became final on December 10, 1962, which reversed a judgment of the United States District Court for the Southern District of New York dismissing the respondent's complaint on the merits.

Petitioner filed a Motion to File Petition for Certiorari and Order Extending Time dated March 6, 1963 which was granted on March 11, 1963 extending petitioner's time for filing petition for writ of certiorari in the above entitled cause to and including May 7, 1963.

Jurisdiction.

Petitioner brought its action in the United States District Court under 29 USC §185 and jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 USC §1254.

Opinions Below.

The opinion of the United States District Court is reported in 202 F. Supp. 518 (1962) and is also printed in the Appendix (A.* 3a and B33).

The opinion of the United States Court of Appeals for the Second Circuit is reported in 312 F. 2d 181 (1962) and is also printed in the Appendix (B** 37).

Statute Involved.

Pertinent Provisions of the National Labor Relations Act, 29 USC §158(d), and of the Labor Management Relations Act, 29 USC §185, are set forth in the Appendix.

Questions Presented.

The questions presented by this petition are:

1. Whether Congress, by enacting 29 USC §158(d), has provided the method for terminating collective bargaining agreements?

2. If, by enacting 29 USC §158(d) Congress has, in fact, provided the method for terminating collective bargaining agreements, whether the parties can vary that method by private agreement?

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* A refers to Appendix in Second Circuit Court.

** B refers to Appendix appended hereto.

3. Whether by operation of 29 USC §158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after the giving of notice to the Federal and State mediation services as required by 29 USC §158(d)(3) when said notice is given late?

4. If by operation of 29 USC §158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after the giving of notice to the Federal and §158(d)(3), when said notice is given late, whether a breach of the terms and conditions of the existing contract during that period gives rise to a breach of contract action under 29 USC §185?

5. If by operation of 29 USC §158(d)(4) the parties are not under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after giving the notice required by 29 USC §158(d)(3), or if the Union cannot enforce arbitration under 29 USC §185 of grievances concerning those terms and conditions so continued in full force and effect, then the question is: after the expiration date of the written contract privately agreed to by the parties, but during the period of negotiations for a new written contract, during which the employees continue to perform their duties pursuant to the terms of the expired written agreement, does the arbitration provision of the expired written agreement remain in effect as manifestly related to those terms and conditions of employment that the employer cannot unilaterally change or terminate during negotiations for a new written agreement, and which accrue to the individual employee as part of the contract of hire, and if so, can the Union enforce, under 29 USC §185, the arbitration provision so continued

in effect as to a breach of those terms and conditions continued in effect as part of the employer-employee relationship and as the *quid pro quo* for the performance of the employees' labor in accordance with the terms of the expired written contract, and in accordance with the public policy of Federal Labor Law of minimizing industrial strife as set forth in 29 USC §151 and as interpreted by the Court in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957).

Specification of Errors to Be Urged.

The Court of Appeals erred as follows:

1. On the first, second and third questions:

(A) In holding that the contract terminated at the end of the extension period privately agreed to by the parties even though the parties had not complied with the requirements and method set forth by Congress in 29 USC §158(d) for terminating or modifying collective bargaining contracts.

(B) In holding that the purpose of 29 USC §158(d) is merely to provide for a waiting period during which there can be *no strike*, that the requirement of notifying the Federal and State mediation services as required by 29 USC §158(d)(3) is a subordinate feature of 29 USC §158(d), that the requirement of 29 USC §158(d)(3) that Federal and State agencies be notified is entirely independent of 29 USC §158(d)(4) which places a duty upon the parties to continue in full force and effect all the terms and conditions of the existing contract until the requirements of 29 USC §158(d) have been complied with, and that therefore the terms and conditions of the existing contract did not continue in full force and effect for 30 days after the Union gave notice to the Federal and State mediation services as required by 29 USC §158(d)(3).

2. On the fourth question:

(A) In holding that even if by operation of 29 USC §158(d)(4) the parties remained under a duty to continue in full force and effect the terms and conditions of the existing contract for 30 days after giving notice to the mediation services as required by 29 USC §158(d)(3), that a violation of the terms and conditions of the existing contract during the period they are so continued in full force and effect would merely give rise to an unfair labor practice charge and would not give rise to a breach of contract action under 29 USC §185.

3. On the fifth question:

(A) In reversing the holding of the District Court that in spite of the expiration of the old agreement, the relationship of employer-employee continued and that one of the conditions of the continuing relationship was the right to arbitrate grievances and holding instead that no right of employees to arbitrate survived the expiration of the collective agreement.

(B) In holding that even if the arbitration provision remained in effect as manifestly related to those terms and conditions of employment that the employer cannot unilaterally modify or terminate during negotiations for a new written agreement, and that even if the arbitration provisions accrued to the individual employee as part of the contract of hire, and as the *quid pro quo* for the performance of the employees' labor in accordance with the terms of the expired written contract and the public policy of Federal Labor Law of minimizing industrial strife, that the Union could not enforce the arbitration provision so continued in effect by an action for specific performance under 29 USC §185, because an unfair labor practice charge would be available as a remedy.

Reasons Relied on For Granting the Writ.

1. That in reversing the judgment in favor of petitioner, and in entering summary judgment for defendant, the United States Court of Appeals, Second Circuit, has rendered a decision in conflict with the decision of the United States Court of Appeals, District of Columbia Circuit, on the same matter wherein the Second Circuit Appellate Court held, in the case at bar, that the requirements of notifying the Federal and State mediation services of a desired contract termination or modification, as required by 29 USC §158(d)(3) is a subordinate feature of 29 USC §158(d), that the requirement of 29 USC §158(d)(3) that notice be served on the mediation services is entirely independent of 29 USC §158(d)(4) by operation of which the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract and that therefore failure to give timely notice to federal and state agencies did not have the effect of placing a duty upon the parties to continue in full force and effect all the terms and conditions of the existing contract, whereas the District of Columbia Court of Appeals interpreting the same two sections of the Statute, i.e., 29 USC §158(d)(3) and (4) in *Local Union 219, Retail Clerks International Association* v. *NLRB*, 265 F. 2d 814 (C. A., D. C., Cir. 1959) (B53) came to the very opposite conclusions regarding the Statute holding that the Mediation Service was considered by Congress as a vital part of the collective bargaining machinery under Section 8(d) and not merely an ancillary feature, that 29 USC §158(d)(3) and (4) were interdependent sections and that therefore the parties were required to continue in full force and effect all the terms and conditions of the existing contract by operation of 29 USC §158(d)(4) for 30 days after giving untimely notice pursuant to 29 USC §158(d)(3).

2. That in reversing the judgment in favor of petitioner and in entering summary judgment for defendant, the United States Court of Appeals, Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, which question is: where the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract by operation of 29 USC §158(d)(4), and one of the parties violates the terms and conditions during the time they are so continued in full force and effect, does such a violation give rise to a breach of contract action under 29 USC §185 or does it merely give rise to an unfair labor practice charge.

3. That in reversing the judgment in favor of petitioner and in entering summary judgment for defendant, the United States Court of Appeals, Second Circuit, has decided an important question of Federal law which has not been, but should be, settled by this Court, which question is: after the expiration date of the written contract privately agreed to by the parties, but during the period of negotiations for a new written contract during which period the employees continue to perform their duties pursuant to the terms of the expired written agreement, does the arbitration provision of the expired written agreement remain in effect as manifestly related to those terms and conditions of employment that the employer cannot unilaterally change or terminate during negotiations for a new written agreement, and which accrue to the individual employee as part of the contract of hire, and if so, can the Union enforce, under 29 USC §185, the arbitration provision so continued in effect as to a violation of those terms and conditions continued in effect as part of the employer-employee relationship, and as the *quid pro quo* for the

performance of the employees' labor in accordance with the terms of the expired written contract, and in accordance with the public policy of Federal labor law of minimizing industrial strife as set forth in 29 USC §151 and as interpreted by the Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

Statement.

On April 30, 1959, the Union and Employer entered into a collective bargaining agreement to be effective until April 30, 1960 and automatically renewed thereafter from year to year unless notice in writing be given by either party at least 60 days prior to the expiration of the agreement. In accordance with the agreement and 29 USC §158(d)(1), the Union gave the 60 day notice to the Employer of its desire to amend the agreement. However, the Union failed to give timely notice to the Federal Mediation and Conciliation Service and the State Mediation Board as required by 29 USC §158(d)(3) until May 13, 1960. The Employer gave no notice whatsoever of its desire to modify or terminate the agreement.

The parties entered into negotiations and agreed to extend the contract until May 14, 1960. During negotiations, the Employer indicated a desire to continue the plant in normal operations after May 14, 1960 (A. 72a, 74a), and the Union stated its intention to abide by the terms and conditions of the collective bargaining agreement, not to strike, and to continue negotiations (A. 85a). In accordance with those stated intentions the employees continued to work as they had before, and the Union and Employer continued to negotiate reaching a new agreement effective on June 23, 1960.

On May 17, 1960 a dispute arose over distribution of overtime (A. 33a) which the Union contended was in violation of the contract. A grievance was filed on May 21, 1960 concerning the overtime distribution dispute which the Employer answered on May 27, 1960 and on June 2, 1960 denying violation of the aforesaid agreement. The Union, after proceeding through the three steps preliminary to arbitration as provided in the collective bargaining contract, demanded arbitration of the grievances in accordance with Article XI, Section 1, Step 4 of the collective bargaining agreement. (A. 13a, 14a). The Employer refused, insisting there was nothing to arbitrate (A. 11a).

On May 28, 1960, the Employer put unfavorable reports on the merit rating cards of approximately 100 warehouse employees without the employee, Union Steward or Executive Officer being present as required by Article VIII of the aforesaid agreement (A. 11a, 12a). On June 7, 1960 the Union filed a grievance with the Employer charging the Employer with violation of the terms and conditions of Article VIII of the contract (A. 11a). The Employer denied the violation. The Union, after proceeding through the steps preliminary to arbitration, demanded arbitration in accordance with Article XI, Section 1, Step 4 of the aforesaid collective bargaining agreement (A. 13a, 14a). The Employer refused to arbitrate. Both grievances occurred within less than 30 days after the Union filed untimely notice with the Federal and State Mediation Services. The grievances were filed and processed in accordance with the grievance procedure as prescribed in Article XI of the aforesaid agreement (A. 13a, 14a). Arbitration was requested after proceeding through the preliminary steps to arbitration and refused for both grievances.

The case at bar arose over the Employer's refusal to arbitrate the grievances in question, which, as related above, occurred on May 17, 1960 and May 28, 1960, after the extension date agreed upon by the parties and before the new agreement was executed on June 23, 1960, but less than 30 days after the Union filed untimely notice with the Federal and State Mediation Service as required by 29 USC §158(d)(3).

The Union filed suit under Section 301 of the Labor Management Relations Act to compel the Employer to proceed to arbitration on said grievances in issue. The Federal District Court rendered a Summary Judgment compelling the Employer to proceed to arbitration holding that the grievance procedure, once established by the collective bargaining agreement, was no longer dependent upon its existence, but only upon the continued relationship of employer-employee.

The United States Court of Appeals for the Second Circuit reversed and granted Summary Judgment for the defendant-employer, holding that the right to arbitrate is in no sense an "incident" or a "condition" of the employer-employee relationship as such, but depends, in exactly the same degree as does the Union's right to arbitrate, on the existence of an agreement to arbitrate. The Court went on to hold that the requirement of notifying the Federal and State Mediation Services is a subordinate feature of 29 USC §158(d), and that the requirement of 29 USC §158(d)(3) that Federal and State agencies be notified is entirely independent of 29 USC §158(d)(4) and therefore that by operation of 29 USC §158(d)(4) the parties did not remain under a duty to continue in full force and effect the terms and conditions of the existing contract where 29 USC §158(d)(3) had not been complied with. The Court indicated that the

purpose of 29 USC §158(d) was merely to provide a waiting period during which there can be no strike, and that even where by operation of 29 USC §158(d)(4) the parties remain under a duty to continue "in full force and effect" the terms and conditions of the existing contract, "full force and effect" does not mean that if those terms and conditions are violated such a violation would give rise to a breach of contract action under 29 USC §185, rather that a violation of those terms continued in full force and effect would merely give rise to an unfair labor practice charge.

ARGUMENT.

By operation of 29 USC §158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after notice is given to the Federal and State Mediation Services as required by 29 USC §158(d)(3).

Congress has set forth the method for terminating collective bargaining agreements in 29 USC §158(d) whereby it is provided that:

> "... where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification——
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneous therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . ."

Interpreting the above requirements of 29 USC §158(d) the United States Court of Appeals for the Second Circuit held, in the case at bar, that the requirements of notifying the Federal and State mediation services of a desired contract termination or modification as required by 29 USC §158(d)(3) is a subordinate feature of 29 USC §158(d). Further, the Court held that the requirement of 29 USC §158(d)(3) that notice be served on the mediation services is entirely independent of 29 USC §158(d)(4).

In interpreting the same two sections, i.e. 29 USC §158(d)(3) and (4) the District of Columbia Court of Appeals came to the very opposite conclusion in *Local Union 219, Retail Clerks International Association* v. *NLRB*, 265 F. 2d 814 (C. A., D. C. Cir. 1959)[1] wherein the Court held:

> "There can be no doubt that the Mediation Service was considered by Congress as a *vital part** of

[1] Printed at page 64 for convenience of Court.

* Emphasis added.

> the collective bargaining machinery under Section 8(d) *and not merely an ancillary feature*• as the trial examiner in J. C. Penney Company maintained."

The Court went on to hold:

> "If the Union fails to give any notice under Section 8(d)(3), or if it gives such notice only after it goes on strike, it would seem reasonable to consider the strike a violation of Section 8(d)(4), even though the strike occurs after the 60-day cooling off period."

Thus it can be seen from the foregoing that the Second Circuit Court of Appeals and the District of Columbia Court of Appeals have come to antithetical interpretations of 29 USC §158(d), the former regarding Section 158(d)(3) as a subordinate feature of the Statute, the latter regarding it as a vital part of the collective bargaining machinery under Section 158(d) and not merely an ancillary feature. Further, the Second Circuit Court concluded that Section 8(d)(3) is entirely independent of Section 8(d)(4) whereas the District of Columbia Court held that Section 8(d)(3) and Section 8(d)(4) were interdependent, stating:

> "It seems more logical to us to interpret 8(d)(3) as making two demands:
>
> "(1)• to require the giving of notice within a 30-day period after the giving of notice under Section 8(d)(1) and
>
> "(2)• to require also a 30-day waiting period before a strike or lock-out, under Section 8(d)(4).
>
> "Thus if *untimely*† notice were given, [as in the case at bar]•• the Union would have committed a violation of Section 8(d)(3). If, however, the Union were to wait for 30 days beyond the Section 8(d)(3)

† Emphasis added.
• Numbers added.
•• Words in brackets added.

notice, and then go out on strike, it would not be in violation of Section 8(d)(4)." *Local Union 219, Retail Clerks International Association* v. *NLRB*, 265 F. 2d 814 (C. A., D. C. Cir. 1959).

It is clear from the foregoing, then, that the District of Columbia Court held that by operation of Section 8(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for thirty days after the giving of the Section 158(d)(3) notice even where that notice was given late, and thus that a strike during the said 30 day period was in violation of the no strike clause of the contract since, by operation of Section 158(d)(4) the no strike clause was continued in full force and effect.

The broader interpretation placed upon Section 8(d) by the District of Columbia Court in *Local Union 219, supra*, that Section 158(d)(3) is not an ancillary feature of the Statute but is of vital importance to the collective bargaining machinery, and that Section 158(d)(3) is interdependent with Section 158(d)(4), and consequently by operation of Section 158(d)(4) the parties are under a duty to continue in full force and effect the terms and conditions of the existing collective bargaining contract for 30 days after giving the Section 158(d)(3) notice, even though that notice is given late, is an interpretation which is more in keeping with the policy of Federal Labor Law as declared in 29 USCA §151 and defined by the courts, than the narrow interpretation placed upon Section 158(d) by the Second Circuit in the case at bar, to wit: that Section 158(d)(3) is a mere subordinate feature of the Statute, entirely independent of Section 158(d)(4). Consequently the Second Court of Appeals holding that:

> ". . . appellee's failure to give timely notice to federal and state agencies did not have the effect of extending the period of the expired contract."

is not in compliance with the public policy of Federal Labor Law and should be reversed.

In *Local No. 3, United Packinghouse Workers, CIO* v. *NLRB*, 210 F. 2d 325 (C. A. 8; 1954) cert. denied 348 U. S. 822 (1954) the Eighth Circuit Court of Appeals held that parties to a collective bargaining contract cannot by private agreement alter the method of terminating or modifying collective bargaining agreements provided by Congress in Section 158(d).

Applying that rationale to the case at bar, the mere fact that the Union and Employer had agreed privately that the written contract would expire on May 14, 1960 would not in and of itself cause the contract terms to terminate on that date where neither of the parties had fully complied with the requirements of Section 158(d). Thus the conclusion of the Second Circuit Court of Appeals in the case at bar, that the Union's failure to comply with 29 USC §158(d)(3) did not have the effect of placing a duty upon the parties to continue in full force and effect the terms and conditions of the existing contract beyond the expiration date privately agreed upon by the parties is contrary to the interpretation placed upon Section 158(d) by the Eighth Circuit Court of Appeals as well as that of the District of Columbia Circuit Court of Appeals in *Local Union 219, supra.* Furthermore, there is little doubt that the holding of the District of Columbia Court in *Local Union 219; supra*, that the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract by operation of 29 USC §158(d)(4) for thirty days after the notice required by 29 USC §158(d)(3) is given to the mediation services, in order to promote industrial peace and by avoiding strikes, is a holding which should apply equally to an arbitration clause as well as a no strike clause. That is so, first, because 29 USC §158(d)(4) reads that *all* the terms and

conditions of the existing contract continue in full force and effect not merely that the no strike clause continues in full force and effect. Second, the Court in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957) held that the agreement to arbitrate is the *quid pro quo* for the agreement not to strike. And in *Steelworkers* v. *Warrier & Gulf Navigation Co.,* 363 U. S. 574 (1960) the Court held that the present policy is to promote industrial stabilization through the collective bargaining agreement and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. Therefore, since the arbitration clause is the *quid pro quo* for the no strike clause, and the policy of industrial peace applies equally to the enforcement of both provisions, the the holding of the Court in *Local 219, supra,* that by operation of Section 158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract for 30 days after Section 158(d)(3) has been complied with would apply alike to an arbitration clause as well as to a no strike clause. Consequently the holding of the Second Circuit in the case at bar that the purpose of Section 158(d) is to provide a waiting period during which there can be *no strike** is an extremely narrow holding which is inconsistent with the wording of the statute as well as the policy of Federal labor law.

Therefore, it is submitted that the Second Circuit Court of Appeals erred in its holdings that the purpose of 29 USC §158(d) is merely to provide a waiting period during which there can be *no strike**, that 29 USC §158(d)(3) is a subordinate feature of the statute entirely independent of 29 USC §158(d)(4) and consequently that the failure to give timely notice to Federal and State agencies as required by 29 USC §158(d)(3) did not have the effect

* Emphasis added.

of extending the terms of the contract beyond the time privately agreed to by the parties. Rather, it is submitted that the decision of the District of Columbia Court in *Local 219*, *supra*, should be followed and that by operation of 29 USC §158(d)(4) the parties remain under a duty to continue in full force and effect all the terms and conditions of the existing contract, including the arbitration provision, for 30 days after the Union gave notice to the mediation services as required by 29 USC §158(d)(3). Nor can it be said such a holding would work a hardship on the Employer, since if the Employer desired to terminate or modify, as was the case in the present controversy, it could have given the notices required by 29 USC §158(d)(1) and (3) itself. In fact, the Statute places the burden of giving said notices on the party desiring to terminate or modify the contract.

Where 29 USC §158(d)(4) places a duty upon the parties to continue in full force and effect all the terms and conditions of the existing contract and the terms and conditions so continued in full force and effect are breached during the protected period, the breach gives rise to a breach of contract action under 29 USC §185.

The second question to consider is: where 29 USC §158(d)(4) places a duty upon the parties to continue in full force and effect all the terms and conditions of the existing contract and those terms and conditions so continued in full force and effect are breached during the protected period, does such a breach merely give rise to an unfair labor practice charge under 29 USC §158(d)(4) or can it be remedied by an action for breach of contract under 29 USC §185.

The United States Court of Appeals for the Second Circuit held in dictum in the case at bar to the effect that even if 29 USC §158(d)(3) and (4) were to be read together and the terms and conditions of the existing contract were to be continued in full force and effect by operation of 29 USC §158(d)(4) for 30 days after the giving of the notice to the mediation services as required by 29 USC §158(d)(3), a breach of the terms and conditions of the existing contract to be continued in full force and effect by operation of 29 USC §158(d)(4) would merely give rise to an unfair labor practice charge under 29 USC §158(d)(4) and not a breach of contract action under 29 USC §185; wherein the Court stated:

> **"Moreover the provision does not suggest that failure to comply will constitute a breach of contract, or that the courts are authorized to take over the function of the Board by awarding specific performance of the terms and conditions of the existing contract."**

It is submitted that 29 USC §158(d)(4) does suggest that if the provisions of 29 USC §158(d) are not complied with causing 158(d)(4) to place upon the parties the duty to continue in full force and effect all the terms and conditions of the existing contract, that a breach of those terms and conditions so to be continued in full force and effect gives rise to a breach of contract action under 29 USC §185. This is so because the Statute states "continues *in full force and effect.*"* In order to determine the *full force and effect* of the terms and conditions of the existing contract so to be continued, it is necessary to determine the full force and effect of those terms and conditions before the point in time from which they are to be continued, which would be during the express term of the contract. Obviously, one of the features of the terms and conditions

* Emphasis added.

of the existing contract during its express term is that if a term or condition of the contract is breached it gives rise to a breach of contract action under 29 USC §185 as well as the unfair labor practice of a refusal to bargain under 29 USC §158. Therefore, if the terms and conditions of the existing contract are continued in full force and effect by operation of 29 USC §158(d)(4) both remedies would remain available for a breach of the terms and conditions during the period of operation of 29 USC §158(d)(4). Otherwise, 29 USC §158(d)(4) would only operate to place upon the parties the duty to continue the terms and conditions of the existing contract in *partial* force and effect since only one instead of all of the remedies previously available would continue to be available.

Moreover, even if the Second Circuit Court's interpretation of 29 USC §158(d) in the case at bar is accepted that:

> ". . . on reading the section as a whole that its purpose is to provide for a waiting period during which there can be *no strike*• . . ."

it is not conceivable that Congress would pass an entire section in order to enforce the "no strike clause" during the cooling off period of the Statute and then would provide only the remedy of an unfair labor practice charge for its breach during that period when Congress has indicated that the unfair labor practice remedy has proven to be an insufficient remedy for breach of the no strike clause, and has passed 29 USC §185 primarily so that an adequate remedy would be available for breach of the no strike clause. See Legislative History of Section 301(a) as cited in *Textile Workers* v. *Lincoln Mills, supra.* Such is not the case, for Congress has stated that by operation of 29 USC §158(d)(4) the parties remain under a duty to continue in *full force and effect* all the terms and conditions of the

• Emphasis added.

existing contract. Therefore, it is submitted that the Second Circuit erred in holding that 29 USC §158(d) does not suggest that failure to comply will constitute a breach of contract. It is further submitted that the United States Court of Appeals for the Second Circuit should be reversed and that it should be held that by operation of 29 USC §158(d)(4) the parties remained under a duty to continue in full force and effect all the terms and conditions of the contract for 30 days after the Union gave untimely notice to the mediation services as required by 29 USC §158(d)(3). That among those terms and conditions of the contract so continued in full force and effect was the arbitration agreement, the breach of which gave rise to an action for specific performance under 29 USC §185.

Where the employees continued to perform their work in accordance with the terms of an expired written contract, the employer is under a duty not to unilaterally modify or terminate the terms and conditions of employment, or the arbitration provision which is manifestly related to those terms and conditions during the period of negotiations for a new written agreement, and the terms and conditions of employment, and arbitration provision manifestly related to them, continue in effect and accrue to the employee as part of the employment contract and as the *quid pro quo* for the labor the employer continues to receive in accordance with the terms of the expired written contract.

If by operation of 29 USC §158(d)(4) the parties were not under a duty to continue in full force and effect the arbitration provision as one of the terms and conditions of the existing contract for 30 days after the Union gave

untimely notice to the Federal and State mediation services as required by 29 USC §158(d)(3), then the question presents itself, whether the District Court was correct in its holding that: "One of the conditions in the relationship during the term of the expired contract was the grievance procedure . . . though the agreement expired . . . the relationship continued, and the right to arbitration under the grievance procedure continued. The grievance procedure, once established by the collective bargaining agreement, was no longer dependent upon its existence, but only upon the continued relationship of employer-employee."

The Second Circuit reversed the District Court, holding: "that no right of employees to arbitrate survived the expiration of the collective agreement."

In reaching its holding the Court stated:

> "The right to arbitrate under a collective bargaining agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union." Citing *Black Clawson Co.* v. *International Ass'n of Machinists*, F. Supp. (D. C. N. D. N. Y. 1962), 45 Lab. Cas. par. 17,643, appeal docketed No. 27624, 2d Cir. June 27, 1962; *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782, (D. C. D. Md. 1959) aff'd 273 F. 2d 614 (4th Cir. 1960) cert. denied, 363 U. S. 849, (1960); *United States* v. *Voges*, 124 F. Supp. 543, (D. C. E. D. N. Y., 1954); *Donnelly* v. *United Fruit Co.*, 75 N. J. Super. 383, 183 A. 2d 415 (App. Div. 1962), cert. granted 38 N. J. 316 (1962); *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297, 182 N. Y. S. 2d 577 (1959); c.f. *Falsetti* v. *Local 2026 UMW*, 400 Pa. 145, 161 A 2d 882, 892 (1960).

While it is true that the right to arbitrate is normally created by a written collective bargaining agreement as are many other rights such as seniority, re-hiring rights,

etc., nevertheless, the cases cited by the Court for its proposition, that the right to arbitrate is incident to the relationship between employer and union rather than to the employer-employee relationship, clearly show that the opposite proposition is true, namely, that the right to arbitration, though created by the collective bargaining agreement is a right belonging to the employees, incident to the employer-employee relationship, and that the Union is merely the trustee of that right with the duty and obligation to carry it into effect, for breach of which duty it is subject to a suit by the employee for damages.

Thus in *Ostrofsky* v. *Steelworkers, supra*, the collective bargaining agreement expressly provided that the individual employee could not *enforce* arbitration. Nevertheless, the court held that under such an agreement an individual employee cannot enforce arbitration *unless** it is shown that the union has violated its duty of fair representation.

Again, in *United States* v. *Voges, supra*, where the union refused to arbitrate the grievances because there were insufficient grounds, and was upheld by the Court, giving wide discretion to the union in the exercise of its control, the Court said:

> "The situation might be different if the Union committed a breach of its duty to the members, which is not alleged, and thus arbitrarily deprived the individual of the possiblility of arbitration."

The plain import of both *Ostrofsky* v. *Steelworkers, supra*, and *United States* v. *Voges, supra*, is that the individual employee possesses the right to have his grievance arbitrated which he can enforce if he can prove that the union breached its duty to him to enforce that right.

The proposition is fully supported in *Parker* v. *Borock, supra*, where the Court held that the employee could sue the

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* Emphasis added.

union for damages for failure of the union to arbitrate his individual grievances in good faith. Obviously if the employee did not have an individual right to have his grievances arbitrated in good faith, there could be no breach of such right for which the union could be sued; consequently, such right must exist.

Falsetti v. *Mine Workers, Local 2026, supra*, sets forth in detail the relationship between the right to have arbitration and the rights giving rise to grievances, and also the relationship between the employer, union and employee concerning those rights. The Court held:

> "the appellant [employee]* is a beneficiary of the appellee Company's promises as to seniority rights, but the Company has limited those promises by refusing to entertain claims based on such rights unless brought by the Trustee Union. . . . The Union has assumed the role of trustee for the rights of its members."

It can clearly be seen that the right to arbitration is a limitation on, and therefore related to, and a part of the individual rights giving rise to grievances, and the union is merely trustee of the right to have grievances arbitrated whereas it belongs to the employees.

However, none of the above cases dealt with the question of whether the right to arbitration survives termination of the written collective bargaining agreement along with other rights and accrues to the individual employee as a term and condition of employment. ***Bethlehem Steel Co.***, 136 NLRB No. 135, 50 LRRM 1013 (1962) dealt specifically with that question. In that case the National Labor Relations Board held that once the collective bargaining agreement had terminated the employer could unilaterally change the Union security and dues check off provisions since the contractual relationship with the Union had ceased

* Word in brackets added.

and those provisions were the union's benefit. Nevertheless, the Board was at pains to distinguish the provisions for seniority rights and the arbitration provision *from* the union security and dues check off provisions. The Board held that an arbitration provision which deals with wages, hours, and other terms and conditions of employment is manifestly related to those matters. The Board went on to hold,

> "Just as the employer could not unilaterally alter *the grievance procedure*,* [which included the arbitration provision]† or would not have been privileged to act unilaterally with respect to any existing wage rate, or term, or condition of employment, no matter how established, it could not on its own choose to disregard the seniority rights."

It is important to note that the National Labor Relations Board grouped the arbitration provision with those individual rights which survive termination of the written agreement and cannot be unilaterally changed by the employer after termination, as opposed to those rights which are merely incidential to the union-employer contractual relationship, and which can be unilaterally terminated by the employer.

The conclusion is supported by decisions reached under the Federal Arbitration Act. In *Robert Lawrence* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C. A. 2d Cir. 1959) cert. granted 362 U. S. 909 (1960), cert. dismissed 364 U. S. 801 (1960), the Court stated:

> "Since the passage of the Arbitration Act . . . illegality in some other part of the contract does not operate to nullify an agreement to arbitrate . . .

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* Emphasis added.

† Words in brackets added.

> nor does an alleged breach or repudiation of the contract preclude the right to arbitrate."

The Arbitration Act envisages a distinction between the entire contract between the parties on the one hand and the arbitration agreement on the other.

Furthermore, the National Labor Relations Board's conclusion that the employer cannot unilaterally alter the terms and conditions of employment after termination of the written collective bargaining agreement, which in *Bethlehem Steel Co., supra*, were held to include the arbitration provision, is supported by the recent Supreme Court decision of *Labor Board* v. *Katz*, 369 U. S. 736 (1962), where the court said:

> "... we hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objects of Section 8(a)(5) much as does a flat refusal."

Federal labor law, then, does not allow the employer to unilaterally change certain provisions of the old agreement after it has expired during the period negotiations are proceeding to reach a new contract.

Therefore, since the subject matter of the grievances in the case at bar, i.e. the right to have overtime distributed, and to have unfavorable reports recorded according to the collective bargaining agreement, are rights which directly benefit the employees, they are terms and conditions of employment which survive the expiration date of the old written agreement and cannot be unilaterally altered or terminated by the employer during negotiations. And since the arbitration provision is manifestly related to

those terms and conditions which the employer cannot unilaterally alter or terminate after the expiration date of the written collective bargaining agreement during negotiations for a new collective bargaining agreement, the arbitration provision equally cannot be unilaterally altered or terminated by the employer during that period. Since the employer obviously received the benefit of the employees' labor during the negotiating period, without a strike, and the public policy of the United States favors such, Section 8(a)(5) must and should be read in consonance with such policy.

Therefore, it is submitted that the holding of the United States Court of Appeals for the Second Circuit in the case at bar "that no right of employees to arbitrate survived the expiration of the collective agreement" should be reversed, and the holding of the Federal District Court in the case at bar that,

> "one of the conditions in the relationship during the term of the expired contract was the grievance procedure . . . though the agreement expired . . . the relationship continued, and the right to arbitration under the grievance procedure continued. The grievance procedure, once established by the collective bargaining agreement was no longer dependent upon its existence, but only upon the continued relationship of employer-employee. . . ."

should be affirmed.

Where by operation of Federal labor law the arbitration provision of an expired written bargaining contract remains in effect during the period of negotiations for a new written contract, during which the employer continues to receive the labor bargained for, the arbitration provision can be specifically enforced under 29 USC §185.

The final question for consideration is, where by operation of Federal labor law, terms and conditions of a collective bargaining agreement, and the arbitration provision manifestly related to those terms and conditions are continued in effect after expiration of the bargaining contract, and accrue to the individual employee as part of the continuing employer-employee relationship and the individual contract of employment, and cannot be unilaterally changed or terminated by the employer during the period of negotiation for a new contract, whether a breach of those terms and conditions and the arbitration provision manifestly related to them, during the period they are so continued in effect, gives rise to a contract action under 29 USC §185 or merely constitutes an unfair labor practice?

In *Steelworkers* v. *Warrier & Gulf Navigation Co.*, *supra*, the Court held that labor arbitration is a matter of contract. It is a matter of collective bargaining contracts, and the Court has held that the law to be applied in suits under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 USC §185, to enforce collective bargaining agreements is Federal labor law.

In applying Federal labor law to collective bargaining contracts, the Courts have held that certain rights initially created by such agreements continue and are incorporated by law into the individual contract of hire even though the employees were beneficiaries and not parties to the collective bargaining agreement which created those rights,

and that the employer cannot unilateraly alter or terminate those rights after termination of the written collective bargaining agreement or during negotiations for a new written agreement. Those rights can only be terminated or altered in accordance with Federal labor law.

The Court in *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961) aff'd 370 U. S. 530 (1962) was confronted with the question whether the seniority and re-hiring rights survived the termination of the written collective bargaining agreement and followed the Employer to its new plant location. The Court held that though the rights had been created by the collective bargaining agreement to which the employees were not parties but only beneficiaries, they had vested in the individual employees because the employees had earned those rights by complying with the terms of the written agreement.

Similarly, courts have enforced rights to vacation pay, retirement pay, and severance pay beyond the date of termination of the written collective bargaining agreement by holding the employer could not have intended the rights earned by the compliance with the contract should go unfunded. *Termination of Collective Bargaining Agreements, Survival of Earned Rights*, 110 U. Pa. L. Rev. 458 (1962).

The Second Circuit Court distinguished the above authorities from the situation in the case at bar holding that in *Zdanok* v. *Glidden*, *supra*, the seniority provisions of a collective bargaining agreement were thought to be prospective in character, that is, they were read to provide for seniority rights which were expected to continue beyond termination of the collective agreement. Can it be said that the right to have overtime distributed according to the contract, which is the substance of one of the grievances sought to be arbitrated in the case at bar, and which directly

effects the employees' pay, and is operated similarly to a seniority provision, is less prospective in character or was any less earned by the employees by their compliance with the contract than their seniority provision? Or can it be said that the employees' right to be disciplined only in accordance with the terms of the agreement, a right which is so essentially a part of the employees' security, and the substance of the other grievance, was any less a part of the consideration given for the performance of the employees' duties, which they continued to perform after the expiration date of the agreement and pursuant to its terms? It is submitted that such a distinction is without substance. This is especially true where, as in the case at bar, the employees continued to perform their part of the contract as before. The employer, by accepting such performance is impliedly agreeing to perform what was agreed between the parties to be the return consideration. Consequently, when the employer refused to proceed to arbitration on the two grievances in question it breached its employment contract with the individuals concerned which gave rise to a breach of contract action.

The question remains, can the union enforce the arbitration provision under 29 USC §185 to remedy said breach during the period of negotiations between the parties but after the expiration date of the old written agreement?

In *Steelworkers v. Warrior & Gulf Navigation Co., supra*, the Court stated:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."

By analogy, then, just as the law governing peaceful settlement of disputes between private citizens is not in abeyance during elections and changes in governments, because if it were, anarchy and strife would soon ensue, so the private system of law molded by the arbitration agreement for the peaceful solution of industrial disputes should not be held to be in abeyance during negotiations for a new written collective bargaining agreement between the parties, if the courts are to promote the policy of the United States of minimizing industrial strife.

The Court was confronted with the question of arbitrability after the written collective bargaining agreement had expired in *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). There a group of employees were discharged for having left their jobs in protest against the discharge of a fellow employee. The union brought suit for specific enforcement of the arbitration agreement concerning their discharge. Before the arbitration award, the written collective bargaining agreement expired. The arbitrator held that expiration of the written collective bargaining agreement did *not* bar reinstatement, or recovery of back pay for the period *after* expiration of the agreement. The Court upheld the award.

While the grievance arose *before* the written collective bargaining agreement expired, it is important to note two things. First, since the arbitrator awarded back pay covering a period *after* the written collective bargaining agreement expired, he was upheld in enforcing arbitration of rights which survived expiration of the written agreement. Second, since the arbitration itself occurred *after* expiration of the written agreement, it can only mean that the arbitrator's contractual power to arbitrate grows out of the agreement to arbitrate rather than the written collective bargaining agreement as a whole, and is severable, survives,

and exists apart from the underlying written collective bargaining agreement.

The question was more clearly presented in *Potoker* v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 141 N. E. 2d 841 (1957) cert. denied 355 U. S. 883 (1957). There two questions were presented: first, whether rights created solely by the collective bargaining agreement survived termination of the written agreement, and second, whether the Union under 301(a) of the Labor Management Relations Act 1947, as amended, 29 USC 185, could enforce arbitration of grievances, which arose after the written agreement expired, over rights which survived the written agreement. The written collective bargaining agreement had expired on March 16, 1955. Thereafter, a dispute arose as to severance and notice of dismissal pay, and vacation pay, the rights to both of which had been created solely by the collective bargaining agreement. The union sought to have those grievances arbitrated. The Company attempted to defend against arbitration on the ground that the dispute arose *after* the agreement terminated. The court enforced arbitration, holding:

> "When these parties executed the within collective bargaining agreement containing the broad comprehensive language 'any dispute arising out of or relating to [the contract]* they must be deemed to have intended the enforcement of its terms by arbitration."

Thus even though the written agreement had expired *before* the dispute arose as to the meaning of its terms, the Court allowed those issues to be determined by the method the parties had agreed upon for their settlement.

Nor would it matter that the unilateral change in the overtime distribution, employee discipline procedures, and

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* Words in brackets added.

grievance procedure during the period of negotiations between the union and employer for a new contract would have amounted to an unfair labor practice, for the fact that a breach of contract would also amount to an unfair labor practice does not oust the Federal District Court of jurisdiction under 29 USC §185 and vest it exclusively in the National Labor Relations Board. *Smith* v. *Evening News Ass'n.* 371 U. S. 195 (1962) reversing *Smith* v. *Evening News Ass'n.* 362 Mich. 350 (1961); *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95 (1962).

Therefore, from the foregoing, it is submitted that the United States Court of Appeals for the Second Circuit erred in holding in the case at bar, "that no right survived the expiration of the collective agreement," and should be reversed, and the District Court's holding, that the arbitration provision survived as a part of the continuing employer-employee relationship and could be enforced by the Union under 29 USC §185 after the expiration date of the old written agreement, should be affirmed.

Wherefore, petitioner respectfully requests that this court grant a Writ of Certorari to the United States Court of Appeals, Second Circuit, and that the holding of the Appellate Court be reversed and plaintiff be granted relief.

Respectfully submitted,

MARTIN J. LOFTUS,
Counsel for Petitioner.

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* Emphasis added.

APPENDIX.

Decision of District Court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT—NEW YORK.

PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, N. Y.,

Plaintiff,

v.

PROCTER & GAMBLE MANUFACTURING COMPANY,

Defendant.

No. 60-C-1022.

Feb. 21, 1962.

SABINO J. BERARDINO, New York City by MARTIN J. LOFTUS, Newark, N. J., for plaintiff.

HALE, RUSSELL & STENTZEL, New York City, for defendant.

MISHLER, District Judge.

FACTS

Plaintiff (Union) and defendant (Employer) entered into a collective bargaining agreement, dated April 30, 1959, which by its terms was to continue until April 30, 1960, and to be renewed from year-to-year thereafter, unless either party to the agreement gave notice in writing to the other 60 days prior to the expiration date "* * * and a date set to negotiate a new Agreement."[1]

During the contract period and thereafter until the present time, the Union was certified by the National

Labor Relations Board as the bargaining agent for the employees involved.

The Union gave more than 60 days notice prior to April 30, 1960, pursuant to Article XXI, to negotiate a new contract. Prior to April 30, 1960, after said notice was sent, the parties agreed to extend the terms and conditions of the contract until May 14, 1960. The contract was not further expressly extended.

On June 23, 1960, the parties entered into a new collective bargaining agreement expiring on June 23, 1962. Between the dates of the termination of the April 30, 1959 contract, i.e., May 14, 1960, and the execution of the June 23, 1960 contract, disputes arose which Union claims are subject to the arbitration clause in the expired contract.

UNION'S CONTENTIONS

The Union claims that its failure to gave notice to the Federal Mediation Service pursuant to 29 U. S. C. A. §158(d)(3) extended the termination date of the contract for the 30 day period referred to therein to June 13, 1960. The plain intent is to condition the right to strike on the giving of the 30 day notice to the Federal Mediation Service to any State or Territorial agency. Local Union 219, Retail Clerks Int. Ass'n. *v.* N. L. R. B., 105 U. S. App. D. C. 232, 265 F. 2d 814, 819. The failure to comply with the section cannot be used as a vehicle for extending the contract period.

The Union further contends that the right to arbitration is a "vested" right.[2] In Zdanok *v.* Glidden Co., 2d Cir. (1961) 288 F. 2d 99, the Court declared that seniority rights, and pension rights are vested rights and are not forfeited with the expiration of the collective bargaining agreement, but extend beyond the term fixed in the agreement. See however dissenting opinion of Lumbard, Ch. J. at p. 105.[3] In Zdanok *v.* Glidden, *supra*, the collective bargaining agreement was made by defendant for its Elm-

hurst, L. I. plant. After expiration of the contract, the plant moved to Bethlehem, Pa. The dissenting opinion in holding that seniority rights did not survive the contract, said at page 105:

> "The issue here is whether this collective-bargaining agreement gave the employees, the right to 'follow the work' to the new site."

In the instant case though the contract expired the relationship of employer-employee continued. During this period of employment, from May 14 to June 23 (the date of execution of a new collective bargaining agreement), all the terms and conditions of the expired agreement were honored except (1) the right to use a union bulletin board and (2) the check-off, or deduction of union dues from employees' pay. During this 5 or 6 week period, negotiations for a collective bargaining agreement continued.

One of the conditions in the relationship during the term of the expired contract was the grievance procedure as set forth in Article XI of the agreement. Though the agreement expired on May 14, 1960, the relationship continued, and the right to arbitration under the grievance procedure continued. The grievance procedure, once established by the collective bargaining agreement, was no longer dependent upon its existence, but only upon the continued relationship of employer-employee. In Food Handlers Local No. 425 *v.* Arkansas Poultry Coop., W. D. Ark. 1961, 199 F. Supp. 895, the Court quoted 31 Am. Jur., Labor §110 entitled Termination at p. 900, a portion of said section stating:

> "An agreement respecting certain terms of an existing collective labor agreement has been held not to amount to a termination thereof if it contains nothing indicating *an intention to abandon the established scheme*, except with relation to a particular subject or part thereof upon which the parties agree." (italics supplied).

The importance of the grievance machinery is emphasized in the language of the Supreme Court in United Steelworkers of America *v.* Warrier & Gulf Nav. Co., 363 U. S. 574, 581, 80 S. Ct. 1347, 1352, 4 L. Ed. 2d 1409, as follows:

> "• • • the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system or private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the party. • • •
>
> "• • • The grievance procedure is, in other words, a part of the continuous collective bargaining process."

I find that all the matters which the Employer claims are issues of fact, are arbitrable. Procter & Gamble Ind. Union *v.* The Procter & Gamble Mfg. Co., 2d Cir. 1962, 298 F. 2d 647. The Supreme Court stated in United Steelworkers of America *v.* American Mfg. Co., 363 U. S. 564, 568, 80 S. Ct. 1343, 1346, 4 L. Ed. 2d 1403, the following:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in a written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

Motion granted. Settle order on two days notice.

Appellate Court Decision.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 61—October Term, 1962

(Argued October 23, 1962 Decided December 10, 1962)

Docket No. 27569

THE PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, N. Y.,

Plaintiff-Appellee,

v.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,

MOORE and HAYS, *Circuit Judges*.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, granting plaintiff's motion for summary judgment to compel the defendant to arbitrate certain grievances. Reversed and summary judgment granted for the defendant.

MARTIN J. LOFTUS, Newark, N. J. (SABINO J. BERNARDINO, New York City, on the brief), for plaintiff-appellee.

JACK G. EVANS, of DINSMORE, SHOHL, BARRETT, COATS & DEUPREE, Cincinnati, Ohio (HAROLD S. FREEMAN,

of counsel; THEODORE W. KHEEL and SAMUEL R. PIERCE, JR., of BATTLE, FOWLER, STOKES & KHEEL, New York City, on the brief), for defendant-appellant.

HAYS, Circuit Judge:

Plaintiff seeks to compel defendant to arbitrate certain grievances. The district court granted plaintiff's motion for summary judgment. We reverse and grant summary judgment for the defendant.

The plaintiff, a labor union, is the collective bargaining agent for a unit of employees at defendant's Port Ivory plant on Staten Island. The employer and the union entered into a collective bargaining agreement which was effective for the period April 30, 1959 to and including April 30, 1960. The agreement provided for automatic renewal unless notice was given by either party at least sixty days prior to the expiration date. In accordance with the terms of the agreement the Union gave notice more than sixty days prior to April 30, 1960, of its desire to negotiate a new agreement. Negotiations were undertaken and continued for some time. Employer and union agreed to extend the collective agreement for two weeks, May 1 to May 14, 1960. On May 13 the union refused the employer's offer to agree to a further extension. The union did not, until May 13, notify the Federal Mediation and Conciliation Service and the State Mediation Board, as required by Section 8(d)(3) of the National Labor Relations Act (29 U. S. C. §158(d)(3)). A new agreement was finally reached and became effective on June 23, 1960.

The collective agreement of April 30, 1959-April 30, 1960 contained an arbitration clause[1] which, we may assume, would have covered the grievances for which the union now seeks arbitration. These grievances were submitted to the employer on May 21 and June 7, 1960. The grievance sub-

[1] The arbitration clause is set forth *infra* note 4.

mitted on May 21 arose out of disiplinary measures taken by the employer on May 18 against two employees for their refusal to accept an assignment of overtime work on May 17. The grievance submitted on June 7 concerned the employer's discipline on May 20 of certain employees for walkouts which occurred on May 18 and May 20. Thus the activities on which the discipline was based, the disciplinary measures the propriety of which the union seeks to arbitrate, and the filing of the grievances all occurred in the interval between the termination date of the old agreement and the effective date of the new agreement.

The union demanded arbitration of the grievances and, when the employer refused to arbitrate, brought the present action to compel arbitration.

The issue is whether the employer was bound to arbitrate these grievances either by any agreement to arbitrate existing at the time these grievances arose, or by reason of any duty created by law.

Before we turn to a discussion of that issue it is necessary to consider a subsidiary issue which was raised by appellant.

Appellant argues that summary judgment should not have been granted because there were controverted issues of fact requiring trial.[2] As to one of these issues, i.e. whether the contract continued in effect after May 14, "by action of the parties", an issue with which we will deal later, we have found no genuine controversy since the evidence shows that the contract was not so continued. The other issue involves the claim of the employer that the grievances in question were "settled" in connection with, and as a part of the consideration for, the new collective

[2] Since in granting summary judgment for appellant we are in a sense giving it even more than it seeks here, it might appear that our result preempts these issues. But if the issues are genuinely controverted the *appellee* has a right to have them tried and summary judgment cannot be granted for appellant. See *Fountain v. Filson*, 336 U. S. 681 (1949); *Propo Corp. v. Pressure Can Corp.*, 234 F. 2d 700 (7th Cir.); cert. denied, 352 U. S. 892 (1956).

agreement of June 23, 1960. We find a determination of this issue unnecessary. Since we hold that in any event there was no effective agreement to arbitrate, it is of no consequence whether the grievances were in fact settled or withdrawn.

The duty to arbitrate is wholly contractual and the courts have the obligation to determine whether there is a contract imposing such a duty.

> "The Congress • • • has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582 (1960).

Our task is, then, to determine whether at the time these grievances arose there was any agreement to arbitrate grievances.

We hold that the district court was correct in finding that the collective bargaining agreement which contained the applicable arbitration agreement expired by its own terms on April 30, 1960, and that the agreement extending the earlier agreement expired on May 14, 1960. It had, then, already expired before the occurrence of the activities out of which these grievances developed.

We reject appellee's argument that the agreement continued in effect by reason of the action of the parties. On May 13, the employer offered to continue the agreement in effect for another limited period. This offer met with a flat refusal from the union. The fact that the employer chose thereafter not to change many of the working conditions which had prevailed under the expired agreement does not tend in any way to establish that that agreement was, or

was considered to be, or was treated as, still effective.[3] It is perfectly natural and entirely customary that, in the short hiatus which is expected to occur between the expiration of one collective agreement and the negotiation of the next, no great change will be made in the existing conditions. Sometimes, as here, a part of the hiatus is covered by an agreed-upon extension of the terms of the expiring agreement. Where no such extension is negotiated, or where the period of the extension has also expired, there is no ground whatever for considering that the old agreement still governs the relationship of the parties. See *Patterson Parchment Paper Co.* v. *International Bhd. of Paper Makers*, 191 F. 2d 252 (3d Cir. 1951), cert. denied, 342 U. S. 933, petition for rehearing denied, 342, U. S. 956 (1952); *Lorenz-Schneider Co.* v. *Bakery Union*, 208 F. Supp. 77 (E. D. N. Y. 1962); *International Air Line Pilots Ass'n* v. *Southern Airways, Inc.*, — F. Supp. — (M. D. Tenn. 1962 (44 Lab. Cas. ¶ 17460); *Foodhandlers Local 425* v. *Arkansas Poultry Co-op, Inc.*, 199 F. Supp. 895 (W. D. Ark. 1961).

But the district court held that in spite of the expiration of the old agreement, "the relationship of employer-employee continued," and that one of the "conditions" of the continuing relationship was the right to arbitrate grievances.

The right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union. Under the collective agreement between the parties, it was the union which had the right to take grievances to arbitration, not the individual employees. See *Black-Clawson Co.* v. *International Ass'n of Machinists*, — F. Supp. — (N. D. N. Y. 1962 (45 Lab. Cas. ¶ 17643), appeal docketed, No. 27624, 2d Cir., June 27, 1962; *Ostrofsky* v. *United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), aff'd 273 F. 2d 614 (4th Cir.), cert. denied,

[3] The employer stated that it would not continue to check off dues, permit use of the bulletin boards or arbitrate grievances.

363 U. S. 849 (1960); *United States* v. *Voges*, 124 F. Supp. 543 (E. D. N. Y. 1954); *Donnelly* v. *United Fruit Co.*, 75 N. J. Super. 383, 183 A. 2d 415 (Super. Ct. App. Div. 1962); *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297, 182 N. Y. S. 2d 577 (1959); Cf. *Falsetti* v. *Local 2026, UMW*, 400 Pa. 145, 161 A. 2d 882, 892 (1960). The agreement provides that "in the event that the arbitration is called for by either party hereto, the Employer and the Union, shall appoint an arbitrator * * * ". The working of the grievance clause as a whole[4] clearly indicates that only the union or the employer can demand arbitration.

[4] "1. The Employer desires that unfairness to its employees shall not exist. A grievance is defined to be any difference between the Employer and Union, or employee or employees covered by this Agreement, as to any matter involving the interpretation or application of any provision of this Agreement (or any matter directly affecting the employee in respect to hours of work, wages or conditions of employment). Such grievances shall be adjusted according to the following procedure:

Step 1—Any employee or group of employees having a grievance shall first present such grievance directly to his department manager or foreman or his steward or other Union representative who shall present it to the department manager or foreman. If the employee or the Union and the department manager or foreman are unable to make adjustment within two working days, unless by agreement with the steward the time is extended and except for mechanical changes, then

Step 2—The grievance shall be reduced to writing on a form prepared by the Union and shall be presented by the employee, steward, or his Union representative to the Plant Manager who in turn shall answer in writing within three (3) working days. In the event the grievance is not settled within three (3) working days, then

Step 3—The grievance shall be presented to the management at the next meeting of the *Union Executive Committee* and the *Division Manager or his representative*. A decision shall be given in writing by the Division Manager or his representative within fifteen (15) working days of the meeting, then

Step 4—In the event that a grievance having to do with the interpretation or application of any provision of this agreement is not settled in the previous steps, such a grievance may be submitted to a Board of Arbitration. *In the event that the arbi-*

Appellate Court Decision.

Moreover the right to arbitrate is in no sense an incident or a "condition" of the employer-employee relationship as such, but depends, in exactly the same degree as does the union's right to arbitrate, on the existence of an agreement to arbitrate. In the absence of such an agreement no employee has the right to compel his employer to arbitrate any matter whatsoever. Thus even if it could be argued that employees had any right to compel arbitration under the collective agreement, which expired on April 30 or May 14, there would be no more reason to hold that that right survived the expiration of the agreement to arbitrate than

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tration is called for by either party hereto, the Employer and the Union shall each appoint one arbitrator within fifteen (15) days after such request. The two arbitrators so appointed shall select a third arbitrator and the decision of any two of the three arbitrators shall be final and binding *upon the Employer and the Union.* In the event that no agreement can be reached on the selection of the third arbitrator within ten (10) days, the parties shall request the American Arbitration Association to submit a list or lists from which a mutually acceptable third arbitrator may be chosen. The decision of said Board shall be made as soon as possible after the appointment of the third arbitrator.

2. It is agreed that there shall be no lockout, strike, or stoppage of work pending final disposition of any grievance.

3. It is further agreed that should any grievance go to arbitration, *the Employer* and *the Union* shall each defray all the cost of its own representative for service upon said Arbitration Board, but that each shall bear half the cost of the expenses and fees of the third member of said Arbitration Board.

4. All grievances not settled shall be presented to the Arbitration Board within 60 days from the date of the initial presentation of the greivance, if practicable.

5. The arbitrators shall confine their consideration to the issue or issues submitted in writing *by the Employer and the Union* before the Board of Arbitration convenes, and shall neither add to nor subtract from the written provision of this Agreement in reaching their decision.
(Emphasis added.)"

Collective Agreement, April 30, 1959, Article XI.

there would be to hold that the union's right so survived. The attempt to argue for a transfer of the right to arbitrate from union to employees upon the expiration of the collective agreement finds no support whatever in authority or logic.

Zdanok v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961) (aff'd on other grounds, 370 U. S. 530 (1962), provides no such support. In that case certain seniority provisions of a collective agreement were thought to be prospective in character, that is, they were read to provide for seniority rights which were expected to continue beyond the termination of the collective agreement. Thus, though the agreement involved was for a period of two years, it provided for the survival of rights of rehiring over a period of three years. Seniority was likened in this respect to "vested" pension rights which continue beyond the termination of a collective agreement.

The principle laid down in *Zdanok* has its application to arbitration procedure. In the same sense that *Zdanok* applies the principle to seniority, the agreement to arbitrate is prospective and the duty to arbitrate survives the termination of the agreement. Grievances which are based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended. This is the real meaning of the cases cited by the appellee. See *e.g.*, *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960); *Potoker* v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 141 N. E. 2d 841, 161 N. Y. S. 2d 609 (1957). This principle has no application to grievances which arise *after the expiration* of the agreement to arbitrate. To hold that *Zdanok* suggests otherwise would be to read into that case a requirement not that accrued seniority should be credited, but that new seniority could be acquired after the expiration of the agreement.

Since we hold that *Zdanok* is inapplicable to the case at bar, we have no occasion to reexamine the principles on

which that decision was based.[5] We believe, however, that we should say that *Zdanok* cannot properly be read to govern situations which are not strictly within the facts there presented. More particularly, the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken.

We hold, then, that no right of employees to arbitrate survived the expiration of the collective agreement.

The appellee seeks to defend the result reached in the district court by two other arguments which are based upon provisions of the National Labor Relations Act (29 U. S. C. 151 ff.). Before turning to these arguments we consider briefly appellant's related contention that by reason of that Act the controverted grievances are not subject to arbitration.

The appellant urges that the activities which are the subject matter of the grievances were arguably unfair labor practices under Section 8 of the National Labor Relations Act (29 U. S. C. 158). From this it is said to follow that the National Labor Relations Board has exclusive primary jurisdiction, and that arbitration, like the courts, is "preempted". *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) is cited in support of the proposition.

The contention has been fully answered by the Supreme Court. In *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, 101, n. 9, that Court said:

> "Since this was a suit for violation of a collective bargaining contract within the purview of §301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, based upon the exclusive jurisdiction of the National

[5] For the position of the Sixth Circuit see *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (6th Cir. 1962).

Labor Relations Board, is not relevant. See *Local 4264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 362 (C. A. 10th Cir.); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C. A. 3d Cir.); see generally *Lodge No. 12; Int'l District No. 37, Int'l Assn. of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (C. A. 5th Cir.); *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (C. A. 9th Cir.); *Local 181, Int'l Union of Operating Engineers* v. *Baldwin Constr. Co.*, 193 F. 2d 470 (C. A. 6th Cir.). As pointed out in *Charles Dowd Box Co* v. *Courtney*, 368 U. S. at 513, Congress 'deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law."' See also H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such. See generally Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52."[6]

The first of what may be called appellee's National Labor Relations Act contentions is that the collective agreement between the parties was extended by reasons of the union's failure to give timely notice to the Federal Mediation and Conciliation Service and the State Mediation

[6] See also *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 245 n. 5, where the Court said:

"The union also argues that the preemptive doctrine of cases such as *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a §301 suit, that doctrine is inapplicable. *Local* 174 v. *Lucas Flour Co.*, 369 U. S. 95, 101 n. 9."

Board as required by Section 8(d) of the Act (29 U. S. C. 158(d)). (The notice was given on May 13 and the grievances arose less than thirty days thereafter).

Section 8(d) provides:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial Agency estab-

lished to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engaged in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The text of Section 8(d) has been set forth in full in order to show the total scheme or plan of that Section. It becomes clear on reading the Section as a whole that its purpose is to provide for a waiting period during which there can be no strike. The requirement of notifying the federal and state mediation services is a subordinate fea-

ture of the plan. They are to be notified so that where there is a threat of strike they may have the opportunity of entering into the negotiations and trying to bring about a peaceful settlement.

The language to which appellee points is:

> (4) continues in full force and effect, without resorting to strike or lock out, all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract whichever occurs later."

But the requirement of paragraph (3) that federal and state agencies be notified is entirely independent of paragraph (4). There is no suggestion in the text that a failure to meet the notice requirements of paragraph (3) will have any effect on paragraph (4). The only notice mentioned in (4) is the 60-day notice of termination.

Moreover the provision does not suggest that failure to comply will constitute a breach of contract, or that the courts are authorized to take over the function of the Board by awarding specific performance of "the terms and conditions of the existing contract." Failure to comply is an unfair labor practice which the Board may redress by a proper order.

The passage from the *Lucas* case which is quoted above indicates that the courts are to administer contract remedies and the Board is to administer the remedies provided under the Act.[7] The fact that the two forums may disagree is

[7] See *International Union of Operating Eng'rs v. Dahlem Constr. Co.*, 193 F. 2d 470, 473-74 (6th Cir. 1951):

> "Moreover, §158, 29 U. S. C., 29 U. S. C. A. §158, does not apply to an action for damages under §185, 29 U. S. C., 29 U. S. C. A. §185. The two statutes are included in totally separate divisions of the National Labor Relations Act, §158 being found in Subchapter II—National Labor Relations and §185 being included in Subchapter IV—Liabilities of and Restrictions on Labor and Management. Section 158 in its original

not to be accepted as an argument for their not pursuing their separate courses. If it were, the Court would not have rejected the "preemption" doctrine. The possibility of conflicting remedies is the very heart of the doctrine of the *Garmon* case which the Court holds is inapplicable to contract disputes.[8]

Appellee would have us hold that the employer by refusing to arbitrate committed an unfair labor practice under Section 8(d). But the doctrine of the *Lucas* case

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form was entitled 'Unfair labor practices by employer defined' and included five paragraphs defining unfair labor practices which are written in the present statute. New definitions of unfair labor practices were included in the amended act and approximately two-thirds of §158 is devoted to such definitions. The paragraphs relied on by the appellant, (d) 1, 2, 3, and 4, were also added to §158, and the heading of the section is 'Unfair labor practices.' No provisions in §158 relate in any way to §185, the heading of which is 'Suits by and against labor organizations—Venue, amount, and citizenship.' The wording of the statutes strongly supports the conclusion that even if the appellant had complied with §158(d), it would receive no immunity from a suit for damages for breach of contract under §185.

This conclusion is supported by the legislative history of the amendment to the Labor Management Relations Act made in 1947. The Senate amendments to the Act at one point contained a provision which defined the violation of the terms of the collective bargaining contract as an unfair labor practice. This provision was omitted by the Senate and House in conference, for the reason that 'Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board.' House Conference Report No. 510, on H. R. 3020, 80th Cong., 1st Sess., 1947, pages 41 and 42. The striking out of the provision which defined violation of the contract as an unfair labor practice is strong evidence that Congress considered breaches of labor contracts to be separate and distinct from unfair labor practices, and intended that they should be separately handled by separate tribunals."

[8] The Labor Management Relations Act itself presents in Section 8(b) (4) and §303 (29 U. S. C. §158(b)(4) and §187) a striking possibility of conflicting remedies, a possibility which has already been given reality in at least one case. See *United Brick & Clay Workers* v. *Deena Artware Inc.*, 198 F. 2d 637 (6th Cir.), cert. denied, 344 U. S. 897 (1962).

must mean that, just as under § 301 contract remedies are entrusted to the courts, remedies for unfair labor practices under Section 8(d) are exclusively the province of the Board. If here the employer cannot defend itself against a contract remedy on the ground that an unfair labor practice is involved, he cannot be held to a contract remedy on that same ground.

We agree with the district court that appellee's failure to give timely notice to federal and state agencies did not have the effect of extending the period of the expired contract. Such meagre authority on the point as there is supports this position. *In re Eisen*, 191 Misc. 662, 77 N. Y. S. 2d 676 (Sup. Ct.), appeal dismissed, 84 N. Y. S. 2d 698 (App. Div. 1948); *International Harvester Co.*, 77 N. L. R. B. 242 (1948); *United States Gypsum Co.*, 90 N. L. R. B. 964 (1950).[9]

Appellee also advances an argument based on the appellant's duty to bargain under the National Labor Relations Act. This argument runs as follows: Even though the collective bargaining agreement expired, the employer could not, unilaterally, and without bargaining to an impasse, change the terms and conditions of employment. One of these unchangeable terms was the provision for arbitration.

We may assume for present purposes that under the National Labor Relations Act a unilateral change in condi-

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[9] "As a further ground for finding that the Respondent violated Section 8(a)(5), the General Counsel, in his brief in support of the Intermediate Report, urges that the Respondent had failed to comply with the 60-and 30-day notice requirements of Section 8(d)(1) and (3), and that the Respondent was therefore required to give continuing effect to the July 11, 1947 agreement with the Union. We find this contention to be without merit. The Union gave the Respondent timely notice of its desire to terminate the agreement. In any event, Section 8(d) was designed to provide a cooling-off period during which a labor organization is forbidden to strike to enforce its demands to modify or terminate a contract. As there was no strike in this case, Section 8(d) is inapplicable." 90 N. L. R. B. at 968 n. 11.

tions of work which is made without prior bargaining with the union is an unfair labor practice. See *National Labor Relations Board* v. *Katz*, 369 U. S. 736 (1962).[10] The union's contention amounts, then, to the charge that the employer's refusal to arbitrate is an unfair labor practice, entirely apart from the existence of any agreement to arbitrate.

It seems entirely clear to us that the federal courts cannot enforce a duty to arbitrate on the ground, not that there is any contract to be enforced under Section 301, but that the refusal to arbitrate is an unfair labor practice under Section 8. The National Labor Relations Board has exclusive jurisdiction to prevent unfair labor practices (National Labor Relations Act, § 10 (29 U. S. C. § 160)), and, on the other hand, the jurisdiction of the federal courts apart from the obligation of the courts of appeal to review orders of the Board, is confined to "suits for violation of contracts between an employer and a labor organization" (Labor Management Relations Act § 301 (29 U. S. C. § 185)). Appellee does not, under this head, claim any breach of contract. The federal courts are without competence to pass upon its claim of unfair labor practice.

We hold, therefore, that the employer was under no obligation to arbitrate the grievances which the union has submitted.

We reverse the order granting summary judgment for the plaintiff. Since we hold that there was no triable issue of fact, and that defendant, although it made no cross motion, was entitled to summary judgment, summary judgment will be entered for defendant. See *Local 33, Int'l Hod Carriers Union* v. *Mason Tenders District Council*, 291 F. 2d 496, 505 (2d Cir. 1961).

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[10] In fact it appears that the Board does not require the employer to refrain from abandoning arbitration without collective bargaining at the termination of an agreement containing an arbitration clause. See *Bethlehem Steel Company*, 133 N. L. R. B. 1347 (1961). The supplemental decision and order of the Board, 136 N. L. R. B. No. 135, modified the previous decision with respect to grievance procedure but not with respect to arbitration.

Local 219, Appellate Court Decision.

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT.

Argued Dec. 15, 1958. Decided March 19, 1959.

LOCAL UNION 219, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 14481.

Mr. S. G. LIPPMAN, Washington, D. C., for petitioner. Mr. JOSEPH E. FINLEY, Washington, D. C., also entered an appearance for petitioner.

Mr. OWSLEY VOSE, Attorney, National Labor Relations Board, with whom Messrs. JEROME D. FENTON, General Counsel, National Labor Relations Board, THOMAS J. McDERMOTT, Associate General Counsel, National Labor Relations Board, and MARCEL MALLET-PREVOST, Asst. General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before WILBUR K. MILLER, WASHINGTON and BURGER, Circuit Judges.

WASHINGTON, Circuit Judge.

This case concerns the interpretation to be given the "cooling-off" provisions of Section 8(d) of the National

Labor Relations Act, added by 61 Stat. 142 (1947), 29 U. S. C. A. §158(d), with particular reference to the requirement of notice to the Federal Mediation and Conciliation Service and its state and territorial counterparts. The Board held that an economic strike called by the petitioner union was unlawful—and in violation of Section 8(d)(4) and Section 8(b)(3) of the Act—because notice of the underlying dispute was not given to the appropriate Federal and state agencies within 30 days after service of the prescribed 60-day notice to the employers. It entered a cease and desist order against the union. 120 N. L. R. B. No. 48 (1958). The union petitions this court to review and set aside the order; the Board petitions for enforcement.

The collective bargaining agreement here involved was by its terms to expire on March 15, 1957. Some ten weeks prior to that date—on January 2, 1957—the union notified the employer-parties that it desired to amend or modify the contract. It acted pursuant to Section 8(d)(1) of the Act, which lays down the "60-day notice" requirement. Bargaining began on February 7, 1957. On March 19, 1957, the union for the first time mailed a notice of dispute, pursuant to Section 8(d)(3) of the Act, to the Federal Mediation and Conciliation Service (the "Mediation Service") and the Illinois Department of Labor. On March 29, 1957, the union commenced an economic strike, with picketing, against certain of the employers; on April 6, it took similar action against the remaining employers. On April 11, 1957, agreement between the union and the employers was reached and the strike and picketing ceased. The first strike began, therefore, some ten days after the mailing of notice of a dispute to the Federal and state agencies.

In appraising the union's conduct, we turn first to the language of the proviso to Section 8(d), which says:

> "That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall

terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) *notifies the Federal Mediction and Conciliation Service within thirty days after such notice* of the existence of a dispute, *and simultaneously therewith notifies any State or Territorial agency* established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later • • •." (Emphasis supplied.)

Section 8(d) further provides that "any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee • • • for the purposes of sections 8, 9, and 10 of this Act • • •." Since Section 8(d) also defines good faith collective bargaining, any established violation of Section 8(d) is also a violation of either Section 8(a)(5) or Section 8(b)(3) and hence an unfair labor practice for which the Board may issue a cease and desist order under Section 10(c), 29 U. S. C. A. § 160(c).

Local 219, Appellate Court Decision.

The issue in the present case is whether an economic strike, more than 60 days after the giving of notice to the employer as required by Section 8(d)(1), but less than 30 days after an "untimely" (delayed) notice to the Federal and state agencies under Section 8(d)(3), is a violation of Section 8(d)(4). The petitioner union admits that the notice to the Mediation Service under Section 8(d)(3) must be given within 30 days after the giving of the 60-day notice required by Section 8(d)(1); it also admits that this notice to the Mediation Service is a mandatory provision of Section 8(d); it further admits that its untimely notice to the Service (given 76 days after the giving of the 60-day notice) was a violation of Section 8(d)(3) and hence an unfair labor practice under Section 8(b)(3). But—contrary to the conclusion of the Board—the union denies that it committed a further violation of Section 8(d)(4) when it went out on strike 86 and 94 days after the giving of the 60-day notice, but only 10 and 18 days after the notice was given to the Mediation Service.

I.

The union urges that the "plain words" of the statute forbid the Board's interpretation. Section 8(d)(4) and the loss-of-status provision of Section 8(d) are, it says, only concerned with a 60-day period; therefore, Section 8(d)(4) was only meant to apply to the notice required under Section 8(d)(1). The union cites the legislative history in an effort to show that a 60-day cooling-off period was all that Congress intended. See, e.g., 93 Cong. Rec. 382 (1947). It relies heavily on the trial examiner's report in Retail Clerks International Association, Local 1179, 109 N. L. R. B. 754, 767 (1954) (The J. C. Penney Company case). The trial examiner there stated that notice to the Mediation Service is not a condition precedent to a strike under Section 8(d)(4); that nothing in the legislative history requires reading Section 8(d)(3) to the contrary; that in fact because of Sections 7 and 13 of the Act, 29 U. S. C. A.

§§ 157, 163, Section 8(d)(3) cannot be read to derogate from the right to strike. Finally the trial examiner remarked that the provision for notice to the Mediation Service "appears to be an ancillary feature of the longer notice period of 60 days which measures the 'cooling off' period * * *." Id. at 768. The union concludes with the argument that "had Congress intended to outlaw a strike after an untimely 8(d)(3) notice, it could easily have used language to attain its purpose."

In the first place, there are no "plain words" of Section 8(d). The Supreme Court itself has recognized that the section "is susceptible of various interpretations." National Labor Relations Board *v.* Lion Oil Co., 1957, 352 U. S. 282, 288, 77 S. Ct. 330, 334, 1 L. Ed. 2d 331. The Court observed that the Taft-Hartley Watch-Dog Committee of the 80th Congress recognized the ambiguities of the section, and that even members of the National Labor Relations Board "have expressed divergent views on the proper construction of § 8(d)(4) * * *." Ibid. The Court therefore concluded that "in the face of this ambiguity it will not do simply to say Congress could have made itself clearer * * *." Id., 352 U. S. at page 289, 77 S. Ct. at page 334. Justice Frankfurter stated in his separate opinion in Lion Oil that—

> "It has * * * become a judicial responsibility to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." Id., 352 U. S. at page 297, 77 S. Ct. at page 338.

What then are the scheme and general purposes of the statute? In Mastro Plastics Corp. *v.* National Labor Relations Board, 1956, 350 U. S. 270, 284, 76 S. Ct. 349, 100 L. Ed. 309, the Court recognized a "dual" purpose in the Taft-Hartley Act: (1) to protect the right of employees to engage in concerted activities, and (2) to substitute col-

lective bargaining for economic warfare. See also National Labor Relations Board *v.* Lion Oil Co., *supra*, 352 U. S. at page 289, 77 S. Ct. at page 334. To state the dual purpose is to present the dilemma of interpreting Section 8(d), for it is precisely here that the two objectives may come into conflict. The whole spirit of Section 8(d) seems to imply, however, that in the context of an expiration, termination, or modification of a collective-bargaining agreement, "Congress may have set a very high value on peaceful adjustments, i.e., the absence of strikes." Mastro Plastics Corp. *v.* National Labor Relations Board, *supra*, 350 U. S. at page 297, 76 S. Ct. at page 365 (Frankfurter, J., dissenting). There can be no doubt that the Mediation Service was considered by Congress as a vital part of the collective-bargaining machinery under Section 8(d) and not merely an ancillary feature, as the trial examiner in J. C. Penney Company maintained. Although it is true that under Section 203(b) of the Labor Management Relations Act, 61 Stat. 153 (1947), 29 U. S. C. A. § 173(b), the Mediation Service is given a discretionary and not a mandatory function in proffering its services in a labor dispute, nevertheless, notice under Section 8(d)(3) is mandatory, and the whole thrust of the section is to give the Service sufficient time to intervene in an effective manner in advance of a stoppage of work, rather than after it has occurred, should the Service deem intervention necessary or desirable. See Stark, Mediation: Use of Government Agencies in Labor Contract Negotiations, Prac. Law., Jan. 1957, pp. 53, 57. As Senator Ives indicated, attention was to be given to the prevention of industrial strife as well as to a cure after the strife had begun. 93 Cong. Rec. 4590 (1947); see 93 Cong. Rec. A4639 (1947). Senator Taft himself emphasized that the 60-day notice provision was included in Section 8(d) "in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service." 93 Cong. Rec. 3839 (1947). The state and territorial services were no doubt considered to have a comparable function.

II.

Granted then that one of the purposes of the statute is to give full scope to the use of the Mediation Service and like agencies in labor disputes arising under Section 8(d), the problem remains as to which interpretation of the section will prove most harmonious with that aim.

The Board's brief in the instant case urges that Congress could not have been concerned only with the 60-day period following notice to the other party; it must have been concerned also with the 30-day period following the notice to the Mediation Service. The brief adds:

> "Since the 30-day period following the giving of notice to the mediation agencies * * * falls wholly within the 60-day period of the notice of modification or termination required by Section 8(d)(1), the prohibition against strikes in this 60-day period automatically covers strikes in the 30-day period after giving timely notice to the mediation agencies under Section 8(d)(3). Hence it was unnecessary for Section 8(d)(4) to contain a specific prohibition against strikes in this latter 30-day period."

Accepting this argument, as we do, what conclusions may be drawn? If the union fails to give any notice under Section 8(d)(3), or if it gives such notice only after it goes on strike, it would seem reasonable to consider the strike a violation of Section 8(d)(4), even though the strike occurs after the 60-day cooling-off period. See the Board's decision in J. C. Penney Co., *supra*. It seems reasonable, also, to hold the strike to be an unfair labor practice if no notice at all had been given to the state agencies, even though it had been given to the Federal agency. Local 156, United Packinghouse Workers, 117 N. L. R. B. 670 (1957) (the DuQuoin case).

More difficult problems arise when "untimely" notice is given to the Mediation Service under Section 8(d)(3)—

untimely in the sense of being given more than 30 days after the beginning of the 60-day period specified in Section 8(d)(1). In International Union of Operating Engineers, Local No. 181 *v.* Dahlem Construction Co., 6 Cir. 1951; 193 F. 2d 470, the union went out on strike several months after it had given untimely notice under Section 8(d)(3); nevertheless, the Sixth Circuit held that the failure to send timely notice forever tainted the strike under Section 8(d)(4) as an unfair labor practice. Such an interpretation of Section 8(d)(3) seems unreasonable, and counter to the spirit of Sections 7 and 13 of the Act, which guarantee the right to strike and the right to participate in other concerted activities.

In an effort to offset the harshness of such an interpretation, a master appointed by a district court indicated that the failure to send timely notice under Section 8(d)(3) could be cured by sending a new 60-day notice under Section 8(d)(1), then sending timely notice under Section 8(d)(3), and then going out on strike after the 60-day waiting period prescribed in Section 8(d)(4) had elapsed. See Schneid *v.* District 50, United Mine Workers, 33 CCH Labor Cases, ¶70,885, at 94,679, 94,684 (N. D. Ill. 1957). Such a view seems a triumph of form over substance. Surely the original 60-day notice should still be valid. The second 60-day notice is but a useless formalism, the purpose of which is to attempt to comply with both the purpose and literal language of the section. A more rational solution seems necessary.

The General Counsel of the Board argued before the trial examiner in the present case that the spirit of Section 8(d)(3) is violated only when the Mediation Service or state agency does not have 30 days to intervene in the bargaining process. Thus, he said, a strike more than 30 days after an untimely notice would not only be valid under Section 8(d)(4), but would cure the violation of Section 8(d)(3) as well. The trial examiner, of course, never reached the solution offered by the General Counsel, since

the strike in the present case" "took place after an interval of substantially less than the minimum of 30 days which would have elapsed had the Respondent's notification been timely." Support for the General Counsel's position, however, may perhaps be found in the Taft-Hartley Watch Dog Committee Report, in which it was emphasized that "under section 8(d)(3), a party . . . must notify the Service 30 days before resorting to a strike or lock-out." S. Rep. No. 986, 80th Cong., 2d Sess., pt. 3, at 15 (1948). Although this interpretation may be consonant with the purpose of the section, it does not seem to give sufficient weight to the requirement of Section 8(d)(3) that notice to the Mediation Service must be given "within 30 days" of the 60-day notice under Section 8(d)(1).

It seems more logical to us to interpret Section 8(d)(3) as making two demands: to require the giving of notice within a 30-day period after the giving of notice under Section 8(d)(1), and to require also a 30-day waiting period before a strike or lockout, under Section 8(d)(4). Thus if untimely notice were given, the union would have committed a violation of Section 8(d)(3). If, however, the union were to wait for 30 days beyond the Section 8(d)(3) notice, and then go out on strike, it would not be in violation of Section 8(d)(4). This interpretation would be consonant with the Board holding in the present case, in which the union went out on strike 10 and 18 days after the untimely Section 8(d)(3) notice, and with the Board holding in United Mine Workers, District 50, 118 N. L. R. B. 220 (1957), in which the union went out on strike 18 days after an untimely notice under Section 8(d)(3). Such an interpretation would avoid the harsh result in Dahlem, and the dubious result in Schneid. Furthermore, even though the waiting period is now beyond a literal 60-day period, this added period hardly seems to violate Sections 7 and 13, for it is only brought about by the union's failure to give the notice prescribed by

Section 8(d)(3), cf. 93 Cong. Rec. 3839 (1947), and not because of a harsh interpretation of the Act.

For these reasons, we think the Board was correct in holding the union guilty of an unfair labor practice, and in issuing a cease and desist order. On that basis, the order of the Board will be affirmed, and enforced.

So ordered.

WILBUR K. MILLER, Circuit Judge, concurs in the result.

Statutes.

29 U. S. C. §151.

SUBCHAPTER II—NATIONAL LABOR RELATIONS

§ 151. FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in

the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1,

Statutes.

49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

29 U. S. C. §158(d).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

29 U. S. C. §185.

§185. SUITS BY AND AGAINST LABOR ORGANIZATIONS—VENUE, AMOUNT, AND CITIZENSHIP

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

RESPONSIBILITY FOR ACTS OF AGENT; ENTITY FOR PURPOSES OF SUIT; ENFORCEMENT OF MONEY JUDGMENTS

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

JURISDICTION

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

SERVICE OF PROCESS

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

DETERMINATION OF QUESTION OF AGENCY

(e) For the purposes of the section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title III, §301, 61 Stat. 156.

Order.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of December one thousand nine hundred and sixty-two.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. LEONARD P. MOORE,
Hon. PAUL R. HAYS,
Circuit Judges.

PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, NEW YORK,
Plaintiff-Appellee,

v.

PROCTER & GAMBLE MANUFACTURING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and that summary judgment will be entered for the appellant in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.